88-16

NO. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

STEVE M. STEPHENS, a/k/a
MOSE STEPHENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

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June, 1988

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit, and the United States District Court for the Northern District of Oklahoma erroneously expanded or ignored this Court's prior holdings and the other circuit courts holdings which require that the accused act in concert with five or more other persons with respect to whom he occupies a position of organizer, supervisor or manager in order for there to be a violation, pursuant to 21 U.S.C. §848(d)(2)(a).

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UNITED STATES CODE

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVE M. STEPHENS, a/k/a

MOSE STEPHENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, Steve M. Stephens, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth

Circuit entered on January 27, 1988, rehearing denied April 7, 1988, mandate issued April 15, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was not published. No opinions were rendered by the Trial Court.

JURISDICTION

The Petitioner is seeking a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to review its opinion affirming the Trial Court's conviction of the Petitioner. Jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 21 §848 United states Code states:

> "(a) Penalties; forfeitures. (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity aftr one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not

more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States -

(A)the profits obtained by him in such enterprise, and

(B)any of his interest in, claim against, property or contractual rights of any kind affording a source of influence over, such enterprise.

(b)"Continuing criminal enterprise" defined. For purposes of subsection (a), a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this title or title III the

punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(c) Suspension of sentence and probation prohibited. In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be

granted, and section 2402 of title 18 of the United States Code and the Act of July 15, 1932 (D.C. Code, secs. 24-203-24-207), and shall not apply.

(d) Jurisdiction of courts. The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a)) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

STATEMENT OF THE CASE

A. Procedural Background of the Case

The Petitioner herein, Steve M. Stephens, was initially indicted by a Grand Jury in the Unitd States District Court in the Northern District of Oklahoma in August of 1986. The indictment alleged participation on two counts, to-wit:

Count I involving a conspiracy to possess with an intent to distribute and to distribute cocaine and heroin pursuant to 21 U.S.C. §846 and, Count II, a violation of 18 U.S.C. §371, alleging a conspiracy to impair and impede the Internal Revenue Service. The appellant was indicted with ten other individuals. Prior to trial, the same Grand Jury returned a superceding indictment alleging Count Three, a violation of 21 U.S.C. §848, the

Continuing Criminal Enterprise statute. All Co-defendants of Appellant plead out pursuant to plea agreements, except one, who plead out pursuant to plea agreements, except one, who was a fugitive at the time of the trial of the Appellant. The trial was commenced on January 12, 1987, and a jury returned a verdict on January 26, 1987 convicting the Appellant on all three counts. Sentencing was held on the 17th day of March, 1987, and the United States District Court for the Northern District of Oklahoma sentenced the Appellant as follows:

Count 1, the conspiracy to possess with intent to distribute and to distribute cocaine and heroin, 20 years, under the enhancement provisions of 21 U.S.C. §851, on Count 2, 5 years, and on Count 3 for operating a continuing

criminal enterprise, 40 years without possibility of parole, together with $50 fine for each count, sentences to be served concurrently.

The Appellant then filed a Notice of Intent to Appeal on the 17th day of March, 1987, and timely appellate proceedings have been commenced.

The Tenth Circuit then rendered its opinion affirming the Trial Court on January 27, 1988. A copy of the opinion of the United States Court of Appeals for the Tenth Circuit is attached hereto as Appendix A.

The Petitioner herein timely petitioned the Court of Appeals for a rehearing it its case, with the Petition for Rehearing being denied by the Court on April 7, 1988, with judgment being

entered and mandate issuing April 15, 1988.

Relevant Facts Underlining the Petitioner's Conviction

The trial of Petitioner lasted some two weeks with some forty-eight (48) witnesses testifying on behalf of the government and the government introducing over two hundred fifty (250) exhibits. The Petitioner applies for this Writ based solely on the Court's interpretation of the Continuing Criminal Enterprise statute. Thus, the Petitioner will limit the facts in this Petition to those facts underlying the Petitioner's conviction under 21 U.S.C. §848, the Continuing Criminal Enterprise statute.

During Petitioner's trial, evidence was presented that Defendant sold drugs

to Samuel (Sammy) Williams and James (Dusty) Lewis and other individuals. The Continuing Criminal Enterprise conviction of the Petitioner was based upon proof that the Petitioner had a supervisory role vis-a'-vis Williams and Lewis and their organizations.

The trial Court in it's order overruling Petitioner's Motion for New Trial, stated as follows:

"Because..the evidence supports a finding that Defendant organized, managed or supervised Lewis and Williams...all of the individuals in the Lewis and Williams branches of the drug maybe counted in reaching the requisite five persons. That there were five or more persons involed in those two branches is undisputable."

The United States Court of Appeals for the Tenth Circuit in it's opinion on page 3, paragraph 3, states that the conviction of the Petitioner must stand or fall upon whether the jury could reasonably believe that the Defendant had a supervisory role vis-a'-vis Williams and Lewis and their organizations.

During the trial and in argument to the United States Court of Appeals for the 10th Circuit, the Petitioner cited the following testimony of Williams and Lewis in support of his argument that as a matter of law, the evidence did not support the Continuing Criminal Enterprise count to the jury. Petitioner based his argument on this Court's holding in Jeffers v. United States, 432 U.S. 173 (1977) and on United States v. Mannio, 635 F.2d 110, (2nd Cir. 1980).

At page 317 of Volume III of the transcript, Sammy Williams testified as follows:

Line 13:

"Q: Well, when did you say you began buying dope allegedly from Mose Stephens?

A: In July of '84.

Q: And you bought it from him allegedly when, March 1st, 1985?

A: Until -- from then until June of '85.

A: What was the quantity you say you bought from him?

A: One ounce.

Q: One ounce? Twenty-five grans?

A: Twenty-five grans.

Q: And how much did you say you paid for it?

A: How much did I pay for it?

Q: Yes, sir.

A: First part I paid 6,000 for it, and the second part I paid 7,000 for it.

Q: Now, when you talked to Mose, allegedly, to buy this dope, you're the one that bought it from him; is that not true?

A: Yes.

Q: Is that true?

A: (Nods head up and down)

Q: And you're the one that went to him and said, "I want to buy some dope" or however it came about, and you're the person that paid for it.

A: Yes.

Q: Now, did Mose Stephens, when you bought this dope, ask you who you were going to sell it to?

A: No.

Q: Did he tell you how to sell it?

A: No.

Q: Did he tell you how to cut it?

A: Yes.

Q: Did you know how to cut it from his instructions?

A: He told me what to put on it.

Q: What to put on it. But he didn't tell you how to cut it, did he?

A: No, he didn't tell me how to cut it.

Q:L You had to go and get somebody else to even cut it, didn't you?

A: Yes.

Q: He didn't participate in any of your profits, did he?

A: No.

Q: That was just you and Dusty and Milton at first.

A: No.

Q: No? Who was it?

A: Me, Alan, and Milton.

Q: Okay. You and Alan and Milton. You came back to get Alan becaue you didn't know anything about selling this much heroin or cutting it, did you?

A: No.

Q: You got Milton so he would go out and sell it for you.

A: Yes.

Q: Did Mose Stephens ever tell you who to get?

Q: No.

Q: Did he ever tell yu how to sell it, when to sell it, where to sell it?

A: No.

Q: And he didn't participate in any of your profits, did he?

A: No.

Q: What you're saying, your testimony yesterday, is all you did for Mose Stephens was buy some.

A: Yes.

Q: Mose Stephens didn't know you were with Alan Hill, did he?

A: No.

Q: Didn't tell him.

A: No.

Q: Didn't know you were with Milton

Birmingham.

A: No.

Q: Later on when you got with Johnny Reagor or Red Ward, he didn't know you were with those people, did he?

A: He didn't know what?

Q: You were with Johnny Reagor or Red Ward or whatever their names were?

A: No.

Q: You're the only person that had any contact with him.

A: Yes.

Q: You hid that jealously; is that not true?

A: Jealously?

Q: You didn't want anybody to know what you were going to do, did you?

A: No.

Q: because you were afraid they might bypass you and start their own business.

A: Yes.

Q: This was your business, wasn't it?

A: Yes.

Q: Mose Stephens didn't have anything to do with your business, did he?

A: Nothing but supplying me with the product that I needed.

Q: That you bought.

A: Yes.

Q: He didn't have anything to do with you running it or making any profits.

A: No.

Q: He didn't have any idea of your dealings with any of your subordinates or equals or partners.

A: My what?

Q: Any of your people that worked for you or worked with you.

A: No, he didn't know them.

Q: Didn't have any agrement with any of them, did he?

A: No.

Q: You're the only person.

A: Yes.

Q: And you only met with Mose when you were by yourself; isn't that true.

A: Yes. Unless Dusty was with me.

Q: Just you three, nobody else.

A: That's all."

James Lewis, a/k/a Dusty Lewis at page 1038, of Volume VIII of the transcript testified to the following:

Line 2:

"Q: Thank you, sir. Now, was your testimony yesterday that you sold cicaine?

A: Yes, it was.

Q: And you bought that cocaine, you said, was your testimony, from Mose Stephens.

A: Yes.

Q: Did Mose force you to buy any cocaine from him?

A: No, he did not.

A: No, he did not.

Q: Did he tell you how to buy it?

A: No, he did not.

Q: Did he tell you how to sell it?

A: No, he did not.

Q: Did he get any profits from your sale?

A: No, he did not.

Q: In fact, you were the one that approached him for the cocaine, weren't you?

A: True.

Q: He didn't have anything to do with your business, did he?

A: No, not anything.

Q: Didn't know who you were selling to?

A: No idea.

Q: Didn't know how you were selling?

A: No idea.

Q: Didn't even know, in fact, if you were selling it, did he?

A: That's true.

Q: You bought large quantities but you could have been using it for yourself and your friends, couldn't you?

A: True.

Q: He didn't know the difference, did he?

A: No, he never did.

Q: And as far as the other things about it, he didn'tget any of your profits?

A: Not any, no.

Q: In fact, you were making profits on that, weren't you?

A: Pardon me?

Q: You were making profits on the cocaine, weren't you?

A: Yes.

Q: And you never told Mose that any money you had came from the sale of cocaine, did you?

A: Wasn't none of his business.

Q: You didn't tell him that?

A: No.

Q: And he had no idea where your money was coming from.

A: No, he didn't.

Q: Whether it was gambline, sale of drugs, sale of houses or any other source.

A: That's true.

Q: He didn't supervise you in any way, did he, about the sale of cocaine?

A: No, he didn't.

Q: Did he manage you in any way?

A: No, he sure didn't.

Q: Did he organize your business?

A: No, not mine, no.

Q: Didn't do anything for you, did he?

A: No.

Q: The only relationship, your testimony is, is that you bought some from him.

A: Tue.

Q: And that's it, isn't it?

A: True..."

Page 1040, line 23:

"Q: Mose never fronte you any money for cocaine, did he, loan you any money?
A: No..."

Page 1041, line 3:

"Q: Mose never gave you any cocaine?
A: No, he never gave me anything.
Q: Did you ever have anybody else sell for you?
A: Yes.
Q: Did Mose tell you who to get?
A: No, no.
Q: Did Mose have anyting to do with those people that sold it for you?
A: Nothing at all.
Q: He didn't even know you had anybody selling for you?
A: No, he didn't
Q: Your dealings with Mose Stephens,

according to your testimony, was over the moment you bought the cocaine.

A: True.

Q: Whatever you did with that was your own deal.

A: Yes."

The evidence relied upon by the prosecution and the evidence cited by the Court of Appeals in its opinion supporting the Petitioner's supervisory role vis-a'-vis Williams and Lewis is as follows:

The government introduced evidence that on one occasion the Petitioner fronted money to Williams for the purchase of drugs. Further, the Petitioner provided a rental car for Lewis and Williams to travel from California to Tulsa, Oklahoma. The Petitioner also helped Williams negotiate

the purchase of a new Corvette and gave Williams two thousand dollars ($2,000.00) to help pay for the vehicle.

There was also evidence introduced that the Petitioner, Lewis and Williams were one-third (1/3) owners of a corporation; Petitioner set up the corporation, and suppliers and contractors looked to the Petitioner for directions and payment. Further, there was evidence of an incident in which a woman was forced to sell her home, apparently worth at least $20,000.00, to the Petitioner for $3,250.00 to pay a debt for drugs her son had bought from Lewis.

The Petitioner moved for judgment of acquittal at the close of the government's case in the trial court, and moved for a new trial at the close of all

evidence contending that as a matter of law there was insurricient evidence to submit the continuing criminal enterprise charged to the jury. The Petitioner then appealed to the United States Court of Appeals for the Tenth Circuit urging the same argument. Based upon the proof as stated above, the United States Court of Appeals for the Tenth Circuit found sufficient evidence indicating Petitioner's supervisory vis-a'-vis Williams and Lewis. The Petitioner argued in the trial court, and on appeal that under this Court's decision in Jeffers v. United States, 432 U.S. 137 (1977) that the allegations as contained in the indictment, and proof produced at trial, clearly showed that the petitioner did not hold a supervisory position vis-a'-vis Williams and Lewis and that both the trial court and the Tenth Circuit Court of Appeals expanded or

erroneously applied 21 U.S.C. §848(b)(a)(2) as defined under Jeffers, supra.

EXISTENCE OF JURSDICTION BELOW

Petitioner was convicted in the United States District Court for the Northern District of Oklahoma on the Continuing Criminal Enterpirse count charging a violation of Title 21 U.S.C. §848.

REASON FOR GRANTING THE WRIT

The United States Court of Appeals for the Tenth Circuit, in affirming the trial court, has sanctioned a departure of the trial court from the accepted and usual course of judicial proceedings in that both the trial court and the Court of Appeals seemingly ignored this Court's

opinion in Jeffers v. United States, 432 U.S. 137 (1977) and the 2nd Circuits opinion in United States v. Mannio, 635 F.2d 110 (2nd Cir. 1980).

I. THE COURTS BELOW ERRONEOUSLY EXPANDED OR IGNORED THIS COURTS PRIOR HOLDINGS IN ALLOWING THE DEFENDANT TO STAND TRIAL ON THE CONTINUING CRIMINAL ENTERPRISE CHARGE WHEN THE EVIDENCE DID NOT SHOW THE ACCUSED ACTED IN CONCERT WITH FIVE OR MORE OTHER PERSONS.

In Jeffers v. United States, 432 U.S. 137, 53 L.Ed. 2nd 168, 97 S.Ct. 2207,(1977), this Court stated as follows:

"The same flexibility does not exist with respect to the Continuing Criminal Statute §848(d)(2)(a) restricts the

definition of the crime to a continuing series of violations undertaken by the accused in concert with five or more other persons. Clearly then, a conviction will be impossible unless concerted activity were presented. The express "in concert" language in the statutory definition quite plausibly may be read to provide the necessary element of "agreement" found wanting in §1955. Even if §848 were read to require individual agreements between the leader of the enterprise and each of the other five necessary participants, enough would be shown to prove a conspiracy. It would be unreasonable to assume trhat Congress did not mean anything at all when it inserted these critical words in §848. In the absence of any indication from the legislative history or else where to the contrary, the far more likely explanation is that Congress intended the word "in

concert" to have its common meaning of agreement in a design or plan. For the purposes of this case, therefore, we assume, arguendo, that §848 does require proof of any agreement among the persons involved in the continuing criminal enterprise."

Footnote 14 of the Jeffers case further indicated:

"The legislative history, the use that Congress has made the phrase "in concert" in other statutes, and the plain meaning of that term all support the interpretation suggested for §848. The house report on HR18 583 which eventually became PUB L 91-513 the Comprehensive Drug Abuse Prevention and Control Act of 1970 assumed the meaning of "in concert" was clear, since it never defined the phrase further. See, e.g., HR Rep No. 91

1444, p. 50 (1970). Even the writers of additional views did not include an objection to the non-definition of the term in their criticisms of other aspects of the continuing-criminal-enterprise section of the law..."

Further, in Footnote 14, the Court stated:

"When the phrase "in concert" has been used in other statutes, it has generally connoted cooperative action and agreement."

Analyzing this Court's interpretation of the agreement as interpreted in Jeffers, supra, it is apparent that the Petitioner's involvement with Williams and Lewis does not rise to the level of involvement as required by §848 with respect to the

position of manager, supervisor or organizer nor does it meet the requirement of a specific agreement as interpreted by Jeffers, supra. Thus, it is Petitioner's contention that the United States Court for the Tenth Circuit has erroneously expanded or ignored this Court's interpretation of Jeffers, supra, by sanctioning the trial court's allowance of the Continuing Criminal Enterprise statute to go to the jury.

Sammy Williams and Dusty Lewis both testified that they had their own drug rings and that the Petitioner knew nothing of the workings of the drug rings. Further, they both testified that the Petitioner did not manage, organize or supervise their drug rings. Both Williams and Lewis testified that the Petitioner merely sold drugs to the men who then distributed the drugs through

their own drug ring. further, Williams testified that he did not want the Petitioner to know anything about his drug ring, at least the Petitioner would sell directly to the members of his ring. Further, Lewis testified that after he bought drugs from the Petitioner, his involvement with the Petitioner was over at that point.

It is also apparent that the District Court and the Court of Appeals based their findings of sufficiency of evidence on the fact that the Petitioner managed or supervised the Williams and Lewis' drugs rings. The United States District Court for the Tenth Circuit found that there was sufficient evidence to indicate that the Petitioner supervisor and organized both Williams and Lewis', despite the direct testimony of Williams And Lewis that the Petitioner

had nothing to do whatsoever with the organization or management of their respective drug rings. The necessary requirement of an agreement or action in concert with five or more individuals is not present in this instance. Thus, the trial court did not follow the law as prescribed by 21 U.S.C. §848 and interpreted by Jeffers, supra, and the United States Court of Appeals for the Tenth Circuit sanctioned a departure from this Corut's ruling by allowing the judge to submit to the jury the Continuing Criminal Enterprise count when the required elements were not met.

II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT'S OPINION IN THE CASE AT BAR IS IN CONFLICT WITH THE DECISION IN UNITED STATES V. MANNIO, 635 F.2d 110 (2nd Cir. 1980).

21 U.S.C. §848, further has a requirement that the Defendant must have organized, supervised or managed the enterprise. In United States v. Mannio, 635 F.2d 110, (1980), the Appellate Court found therein:

"The operative concepts used in §848 "organize," "supervise", and "manage" - are not technical, and we see no reason to give them other than their everyday meanings. See United States v. Valenzuela, 596 F.2d 1361, 1367-68 (9th Cir.), cert. denied, 444 U.S. 865, 100 S.Ct. 136, 62 L.Ed.2d 88 (1979). It is true that cases involving well-defined chains of command under the control of a "King Pin", e.g., United States v. Johnson, (citations omitted), offer the clearest examples of organization, supervision, or management, but the necessary showing can plainly be made in

the case of a less structured enterprise. In this case, Mannio's very success as a middleman with a vast network of purchasers and sources of immense supply, see note 2 supra, reveals his essential function as an organizer, supervisor, or manager.

But at a more specific level, there was ample evidence to establish individual relations of control with at least five persons. The first of these was Cordano; the evidence showed that Mannio alone set the terms for Cordano's sale, including the quantity and place of delivery, and that Cordano had no latitude to vary Mannino's instructions. The evidence also showed that Mannino "organized" the trip of two couriers, Joey and Lance - Mannino's so called partners - to Florida for a large drug pickup in 1975; Mannino provided the

moneyu for the trip, gave the couriers coded instructions for the pickup, and arranged to assemble the recipients for distribution of the drugs upon their delivery to New York. Next, Mannino's notebook recorded a payment of "$10,000 for work" to "Muga" the person assisting Mannino at the time of his arrest, indicating the existence of a relationship that even Mannino concedes satisfies the statutory requirement. Finally, the evidence also showed that Mannino's brother "Zig" had acted on his behalf in collecting debts from a purchaser named Rob. Thus, viewing the evidence in its entirety rather than by minute dissection, the jury was entitled to conclude that Mannino organized, supervised, or managed a large drug ring involving at least five persons."

The analysis in the instant case

falls far short of the Mannino requirement. According to the evidence, the only thing that the Appellant did was sell drugs to Williams and Lewis. Thus, the Tenth Circuit decision is not compatible with the 2nd Circuit decision in Mannino, supra, and this Court should grant certiorari to review requirements that must be met before a charge of Continuing Criminal Enterprise may be submitted to the jury.

CONCLUSION

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the Trial Court's conviction of the Petitioner on the Continuing Criminal Enterprise count erroneously ignores or expands this Court's prior holding in Jeffers v. United States, and is in conflict with the United States Court of

Appeals for the 2nd Circuit decision in United States v. Mannino, which require that an accused act in concert with five or more other persons with respect to whom the accused occupies a position of organizer, supervisor or some other position of management.

For the reasons set forth hereinabove, the Petitioner request that the Writ of Certiorari be granted.

Respectfully submitted,

WARREN GOTCHER, OBA #3495

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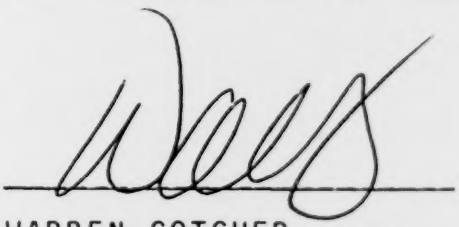
ATTORNEYS FOR PETITIONER

June, 1988

CERTIFICATE OF MAILING

I, Warren Gotcher, hereby certify that on this the 5th day of July, 1988, I mailed three (3) true and correct copies of the within and foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing it in the U.S. Mails, postage prepaid, pursuant to Rule 28.4 and 28.5 of the Rules of Appellate Procedure of the Supreme Court.



WARREN GOTCHER

OBA #3495

A P P E N D I X "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 87-1396

(D.C. No. 86-CR-112-C)

(N.D. Oklahoma)

STEVE M. STEPHENS,
a/k/a MOSE STEPHENS,

Defendant-Appellant.

(This order was filed January 27, 1988, Robert L. Hoecker, Clerk, U.S. Court of Appeals.)

On appeal from the United States District Court for the Eastern District of Oklahoma - Honorable Frank Seay, Presiding

Before: LOGAN, SETH and BARRETT, Circuit Judges.

LOGAN, Circuit Judge:

Defendant Steve M. Stephens, a/k/a Mose Stephens, appeals his conviction after a jury trial of conspiracy to possess and distribute heroin and cocaine, in violation of 21 U.S.C. §§841 and 846, conspiracy to impede and impair the collection of federal income taxes, in violation of 18 U.S.C. §371, and engaging in a continuing criminal enterprise, in violation of 21 U.S.C. §848. On appeal defendant challenges the sufficiency of the evidence to support the conviction for conspiracy under 18 U.S.C. §371 (Klein conspiracy) and for conducting a continuing criminal enterprise (CCE). He also argues that the district court erred in admitting, to support the CCE count, evidence of defendant's involvement in drug transactions in 1982 in California; in

the alternative, he argues that if such evidence was proper, the district court should have permitted additional evidence that the California charges were dismissed. We reject arguments and affrim the convictions.

Defendant's most serious challenge is to the continuing criminal enterprise conviction.[1] Defendant argues that the proof was insufficient to show that he was in a "position of organizer, a supervisory position, or any other position of management" in concert with "five or more other persons," as required by 21 U.S.C. §848(d)(2)(a). The record contains overwhelming evidence that defendant sold substantial quantities of heroin and cocaine over a significant time period, both while defendant lived in California and after he moved to Oklahoma. The record also shows that

defendant sold drugs to Samuel (Sammy) Williams, James (Dusty) Lewis and a female friend acting as their agent. A reasonable inference from the evidence is that defendant moved to Oklahoma at least in part to be able to cooperate better with Williams and Lewis, to whom he sold drugs both before and after the relocation.

Defendant's principal contention is that he was shown only to be a seller of drugs to these persons, and not as a manager of a criminal enterprise of five or more other persons. We have read the entire record carefully and conclude that the evidence, together with the reasonable inferences therefrom, supports a finding beyond a reasonable doubt that defendant was indeed in a supervisory position over five or more other persons, as contemplated by §848. We therefore

uphold the conviction.

First, evidence showed that defendant used members of his own family to conceal the profits from drug sales, by ahving them take title to real and personal property which he had purchased, to pay bills from bank accounts owned by defendant, and perhaps to participate in drug deliveries.

This evidence, by itself, is not sufficient to uphold the CCE conviction. That conviction must stand or fall upon whether the jury could reasonably believe that defendant had a supervisory role vis-a-vis Williams and Lewis and their organizations. Williams, a seller of heroin, and Lewis, a seller of cocaine, admittedly had several persons working for them in their own drug distribution systems. Although these two distribution

systems operated somewhat independently, Williams and Lewis sometimes shared living quarters and profits, at least from Lewis' cocaine transactions. Evidence supporting defendant's supervisory role over Williams and Lewis and their organizations includes defendant's fronting money for Williams' drug purchase in at least one instance, his providing a rental car for them to travel from California to Tulsa, and having Williams return it to him in California after defendant came to Tulsa and drove the car from Tulsa to Kansas City to attend a funeral. Defendant also accompanied Williams to a car dealership, where he helped him negotiate the purchase of a new Corvette and provided several thousand dollars cash to help pay for the vehicle. When a cellular telephone was installed in the automobile, defendant assumed the billing

responsibility for it. Evidence also indicated that properties titled in Lewis' or Williams' name were at least partially owned by defendant. Defendant, Lewis and Williams were one-third owners of a corporation; defendant set up the corporation, and suppliers and contractors looked to him for directions and payment. Most incriminating, perhaps, is the evidence of an incident in which a woman was forced to sell her home, apparently worth at least $30,000, to defendant (who took title in his son's name) for $3,250 to pay a debt for drugs her son had bought from Lewis. In that transaction Lewis threatened that defendant would harm or kill th son, if the sale were not made. We are satisfied that a reasonable jury could find that defendant's connection to Lewis and Williams and their organizations was more than as a seller to them, despite Lewis' and Williams' testimony that they never

told defendant the identities of the persons distributing drugs for them and never told their underlings who provided the drugs they sold.

The evidence also supports the conviction on the Klein conspiracy count for impeding the Internal Revenue Service in the collection of taxes. Defendant filed no income tax returns for several years, including the period of the alleged conspiracy. A government expert detailed approximately $140,000 in cash transactions by defendant in a little more than a year, with almost no source of funds identifiable other than drug sales. Most of these expenditures were to purchase or improve properties titled in the names of defendant's family, Lewis, Williams, other associates, or corporations which defendant controlled. A jury could reasonably infer a pattern

of concealment from this evidence of paying for nearly everything with cash and titling properties in the names of others. Evidence also showed defendant attempting to fake a loan transaction from a California trust to cover up cash used to purchase a property, and exchanging cash for cashier's checks which were taken in other people's names. In sum, the record amply supports defendant's pattern, in collusion with others, of concealing proceeds of drug sales to avoid discovery and taxation.

Finally, defendant challenges the admission of certain evidence to support the CCE charge. That evidence was obtained from the execution of a search warrant in 1982 in California. He first asserts that the evidence does not show any violation in Oklahoma, and that it cannot be connected with a continuing

series of crimes which include Oklahoma violations. To refute the inference that the California evidence shows a part of a continuing series, defendant asserts that the California police seized only small amounts of heroin and cocaine, that the heroin was of a different type--"black tar" rather than "powder"--and that defendant was shown only to be a seller or distributor who was not acting in concert with others.

We agree with the government that it was not necessary to show that the violation occurred in Oklahoma or was connected to defendant's later transactions in Oklahoma. The amounts and the differences in the type of heroin do not detract from the purpose for which the evidence was introduced: to show that in 1982, two years before he commenced his association with Williams and Lewis,

defendant was in the business of selling both heroin and cocaine. See United States v. Markowski, 772 F.2d 358, 361 (7th Cir. 1985).

Defendant also challenges the California evidence on the ground that the affidavit which supported the search warrant was conclusory; and defendant points out that a California court quashed the search warrant and suppressed the evidence. Nothing in the record relates why the California state court quashed the search warrant. The district court nonetheless properly admitted the evidence, since a federal court to which evidence is offered must make an independent inquiry of the evidence and the affidavit and search warrant which produced it "whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry

may have turned out." Elkins v. United States, 364 U.S. 206, 224 (1959). The district judge below examined the affidavit supporting the search and the conduct of the search and concluded that it was admissible in the fedral court prosecution under currently applicable principles. See Illinois v. Gates, 462 U.S. 213 (1983); United States v. Leon, 468 U.S. 897 (1984). We agree and find no error in the court's admission of the evidence.

AFFIRMED.

Entered for the Court

JAMES K. LOGAN
Circuit Judge.

Footnote 1:

The CCE charge was in a superseding indictment that is not included in the record on appeal. Thus, we do not know the particulars of the charge--whether overt acts were set forth in the count or the prosecution relied upon acts charged in other counts of the indictment. We also do not know whether the time periods in the CCE charge were coexistent with those of the Klein conspiracy. Therefore we do not consider the problems recently dealt with by this court in United States v. Rivera, Nos. 85-1768 and 85-1771 (10th Cir. Jan. 20, 1988).

APPENDIX B

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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UNITED STATES OF AMERICA, Appellee,

vs. No. 87-1396

STEVE M. STEPHENS, a/k/a
MOSE STEPHENS, Appellant.

****

PETITION FOR REHEARING EN BANC

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STEVE M. STEPHENS a/k/a
MOSE STEPHENS, Appellant

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March, 1988

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,

vs. No. 87-1396

STEVE M. STEPHENS, a/k/a

MOSE STEPHENS, Appellant.

PETITION FOR REHEARING EN BANC

PROPOSITION I

THE COURT ERRED IN CONSIDERING THE APPELLANT'S BUSINESS RELATIONSHIP WITH LEWIS AND WILLIAMS IN SUSTAINING THE APPELLANTS CCE CONVICTION AND FINDING SUFFICIENT EVIDENCE THAT THE APPELLANT WAS AN ORGANIZOR, SUPERVISOR OR MANAGER, VIS-A-VIS, THE WILLIAMS AND LEWIS DRUG RINGS.

The Appellant argued on appeal that

the record contained evidence of a buyer-seller relationship between Appellant, Williams and Lewis. Appellant's principal contention was that he was only shown to be a seller of drugs to the above individuals, and not as a manager of a criminal enterprise of five or more other individuals. The Government's own witnesses testified that the Appellant held no position of organizor, manager or supervisor over them. Further, there was no evidence to contradict the testimony of Williams and Lewis and that the Appellant had no control over their respective drugs rings. Appellant argues taht the Government's witnesses testimony must be taken as true since the Government is in charge of its case in chief and the evidence presented must be taken as true, if not contradicted. In this case, the testimony of Williams and Lewis to the

effect that the Appellant did not control their drug rings must be taken as true.

The Court in its order affirming Appoellants CCE conviction relies heavily on the evidence that showed that the Appellant had business dealings with Williams and Lewis. Specifically, the Court stated that the Appellant's CCE conviction must stand or fall upon whether the jury could reasonably believe that Appellant had a supervisory role VIS-A-VIS Williams and Lewis and their organizations. (Page 3 or the Court's Order). The Court then summarizes the evidence of the business dealings of the Appellant, Williams and Lewis. This evidence showed that the Appellant helped Williams purchase a car and provided money to pay for the vehicle. The Appellant further helped Williams obtain a cellular telephone for the automobile.

The evidence also indicated that properties titled in Lewis or Williams name were at least partially owned by the Appellant. The Appellant, Lewis and Williams also were co-owners of a corporation which the Appellant set up. The Court then stated that the most incriminating evidence, was the testimony that a woman was forced to sell her home for some $3,000.00 to pay a drug debt for drugs her son had purchased from Lewis. The Court then states that the evidence was sufficient such that a reasonable jury could find that the Appellant's connection to Lewis and Williams and their organizations was more than a Seller to them, despite the fact that Lewis and Williams testified that they never told Appellant the identities of the persons distributing drugs for them and never told their underlings whoi provided the drugs they sold.

PROPOSITION IA

THE EFFECT OF THIS COURT'S HOLDING IS THAT ANY PERSON WHO SUPPLIES DRUGS TO TWO INDEPENDENT DRUG RINGS WHO ALSO HAS BUSINESS DEALINGS WITH THOSE INDIVIDUALS CAN BE FOUND GUILTY OF A CCE VIOLATION DESPITE THE FACT THAT THE GOVERNMENT'S OWN WITNESSES TESTIFY THAT THE APPELLANT HAD NO CONTROL OR MANAGEMENT OVER THEIR SEPARATE DRUG RINGS.

It is Appellant's contention that the business dealings between the Appellant, Williams and Lewis cannot be used as evidence against the Appellant as applied to the CCE charge, unless the evidence goes to show that the business dealings were in fact directly related to the Appellant's management, control or supervision over the Williams and Lewis drug rings. If this is not the case,

anyone who had extensive business dealings with two individuals, who then sold drugs on a mere buyer-seller relationship to those individuals could be convicted of a CCE violation if it were shown that the two individuals he sold drugs to had independent drug networks and rings under their control. Clearly, this is not the law, nor was it the intent of Congress when the Statute was passed. The evidence of the Appellant's business dealings with Williams and Lewis's drug network. In fact, the evidence that the Government presented showed that the Appellant had no control over the drug rings. The only reasonable inference from the evidence was that Williams and Lewis operated their own drug networks and merely purchased drugs from the Appellant. The fact that the Appellant had business dealings with Williams and Lewis cannot

be used as evidence of the Appellant's control over the drug rings. The evidence showed that they were in fact separate. None of the people involved in the Williams and Lewis drug networks were involved in the business dealings between Appellant, Williams and Lewis.

To allow the jury to disregard the clear intent of the evidence as shown by Williams and Lewis's testimony and consider as evidence the business dealings between the Appellant, Lewis and Williams, is inappropriate circumstantial evidence of a CCE violation. It is not reasonable to infer that merely because one has business dealings VIS-A-VIS another and has a position of management over the business dealings, that also that person must have a position of management over the drug rings, when the government's own evidence showed that the

Appellant did not have a position of management or supervisor over the drug networks.

In short, the Appellant argues that it was inappropriate for the jury to consider the business dealings between the Appellant, Williams and Lewis because the record and the evidence did not support that the business dealings in any way showed that the Appellant also managed or supervised Lewis or Williams's drug rings. It is an inappropriate use of circumstantial evidence to allow the jury to consider this in the CCE charge.

Therefore, the Appellant requests a rehearing en banc on the issue of his CCE conviction.

PROPOSITION II

THE APPELLANT IS ENTITLED TO REHEARING EN BANC FOR THE REASON THAT THE SUPERCEDING INDICTMENT WAS NOT PRESENTED TO THE COURT ON APPEAL AND THE INDICTMENT DID NOT ALLEGE THREE OR MORE DRUG FELONY CONFICTIONS PURSUANT TO 21 USC §848.

The CCE charge against Appellant was charged in a superceding indictment that was not present for the Court on appeal. See the Order of the Court, Footnote 1, page 2. The Appellant argues that in a criminal case, the record properly consists of the indictment properly endorsed is found by the grand jury, the arraignment of the accused, his plea, the impanelling of the jury, their verdict, and judgment of the Court. Powers v. U.S., 223 U.S. 303, 56 L.Ed. 448 32 S. CT. 281 (1912). Further, the Court of

appeals is entitled to review all records which the District Court reviewed, U.S. v. Burk, 781 F.2d 1234. See also, Rule 10 of the Federal Rules of Civil Procedure.

In this case, the superceding indictment was filed November 6, 1986, and alleged to overt facts of drug felonies. The Appellant was charged with violating 21 USC §848 which requires the indictment to allege three or more drug felony convictions. See U.S. v. Ordez, 737 F.2d 793 (9th Cir. 1984).

Nowhere in the indictment is the Appellant charged with the commission of three or more felonies. The indictment fails to give adequate notice of the charges sufficient to sustain a verdict of guilt in this case. U.S. v. Gimbel, 830 F.2d 621 (7th Cir. 1987).

In U.S. v. Rivera, N.O.S. 85-1768 and 851771 (10th Cir. Jan. 20, 1988), the Court was faced with the precise legal issued involved in Petitioners case herein. The government, at trial, brought evidence of uncharged felony allegations and used such evidence as substantive evidence to support the CCE charge. The Appellate Court found, "that when the indictment charging the CCE fails to sufficiently specify the breath of the criminal transactions, the Defendnat must meet, the Defendant suffers several harms. He cannot adequately prepare his defense, and the prosecution gains an unfair advantage of being free to shift its theory of criminality so to take advantage of each vicissitude of trial and appeal. If the trial court prohibits evidence of a different offense of which the Defendant had no prior notice."

If the prosecutory plans to sue an offense that is not separately charged in the indictment, he or she must present those facts to the grand jury in order to satisfy Fifth Amendment concerns, and must avert those facts to the indictment so as to satisfy Sixth Amendment and due process notice requirements. Rivera, supra. In this case, the superceding amendment was not before the Court on appeal. The superceding indictment is a proper part of the record and should have been furnished to the Appellate Court. Further, the superceding indictment did not allege the acts necessary as charged under 21 USC §848. The Appellant requests this Court to grant him a rehearing en banc as the superceding indictment was not properly before the Court on appeal, nor did the superceding indictment allege facts necessary to obtain a CCE conviction as set forth in

U.S. v. Rivera, supra.

SUMMARY

Appellant request that this Honorable Court grant him a rehearing en banc as the evidence was not sufficient to suppor a CCE violation and the evidence of the Appellant's business dealings with Lewis and Williams was not appropriate circumstantial evidence to allow the jury to infer that the Appellant also managed or controlled Lewis and Williams's independent drug rings. Appellant further requests a rehearing en banc as the superceding indictment was not properly before the Court on appeal and did not allege facts necessary to obtain a CCE conviction.

STEVE M. STEPHENS,
a/k/a MOSE STEPHENS,

Appellant,

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ATTORNEYS FOR APPELLANT

APPENDIX C

MARCH TERM - April 7, 1988

Before Honorable William J. Holloway, Jr. Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, and Honorable Bobby R. Baldock, Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs. No. 87-1396

STEVE M. STEPHENS,

Defendant-Appellant.

(D.C. No. 86-CR-112-C)

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant in the captioned

case.

Upon consideration whereof, the petition for rehearing is denied by panel to whom the case was argues and submitted.

The Petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER, Clerk